IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1618

WILLIAM ESCARSEGA COSTEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
Directed to the United States Court of
Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MORRIS LAVINE
617 S. Olive St.,
Suite 510
Los Angeles, Ca. 90014
(213) 627-3241

Attorney for Petitioner

TOPICAL INDEX

APPENDIX

TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

WILLIAM ESCARSEGA COSTEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
Directed to the United States Court of
Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE WARREN BURGER AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, William Escarsega Costey, respectfully petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review

and reverse judgments of conviction of Counts One, Four and Five of the indictment on which he was convicted in a non-jury trial. Costey was indicted along with several others for alleged conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. Sec. 846 for possession, together with one Thomas Timothy Mika, aka Riggio, and others, with intent to distribute in violation of 21 U.S.C. Sec. 841(a)(1), on April 7, 1975, and for aiding and abetting Riggio in the distribution of heroin in violation of 21 U.S.C. Sec. 841(a)(1) and 18 U.S.C. Sec. 2 (aiding and abetting). Costey appeals from the convictions following the non-jury trial and concurrent sentences on all three counts.

Costey's contention is that there is a total lack of evidence to sustain the judgments and conviction and that his conviction, therefore, is violative of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. Costey also contends that the Court of Appeals, as well as the trial Court erred in holding that in a conspiracy case only "slight" evidence is needed for a jury to find participation in a conspiracy. Costey contends that Title 18, Section 2, defining who is an aider and abettor, or in effect an alleged co-conspirator, must be proved by evidence beyond a reasonable doubt, the same as every other element in the entire criminal case. (In re Winship, 397 US 358)

He further contends that the Court of Appeals denied him due process of law when it did not consider the issues of insufficiency of the evidence and total lack of evidence raised in the possession

count.

The Court of Appeals said:

"Costey's primary contention on appeal is that the evidence was insufficient to sustain the judgment of conviction. As to the possession counts, he makes a persuasive argument. See United States v. Gardner, 475 F.2d 1273 (9th Cir.), cert. denied, 414 U.S. 835 (1973), and United States v. Epperson, 485 F.2d 514 (9th Cir. 1973). However, Costey received a concurrent sentence on all three counts. Therefore, if we affirm the conspiracy count, we need not consider the issues raised as to the possession counts. United States v. Rodriguez, ___F.2d___,___ (9th Cir. Nov. 18, 1976); United States v. Murray, 492 F.2d 178, 186 (9th Cir. 1973), cert.denied, 419 U.S. 854 (1974); see Benton v. Maryland, 395 U.S. 784 (1969)."

Petitioner contends that failure of the Court of Appeals to consider the total lack of evidence on all three counts to sustain his conviction is a denial of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

Petitioner further contends that this case raises important questions of criminal law which this Court has not passed upon but should pass upon in this case.

The Court of Appeals said in its opinion "According to our research, the slight evidence rule has never been

applied in this context".

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254, U.S.C.

The opinion of the Court of Appeals was rendered and filed in the Ninth Circuit on January 31, 1977 (No. 75-3566). A copy is attached hereto as Appendix "A".

A petition for rehearing was duly filed and denied on April 21, 1977.

This petition for writ of certiorari is filed within 30 days of the denial of the petition for rehearing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment, U.S. Constitution; Title 18 U.S.C. Sec. 371 (conspiracy); Title 18 U.S.C. Sec. 2 (aiding and abetting; Title 21 U.S.C. Sec. 846; Title 21 U.S.C. Sec. 841(a)(1).

THE FACTS

On April 7, 1975 defendant Thomas Timothy Mika, aka Riggio, met with Special Agent William Dean of the Drug Enforcement Administration at the Copper Penny Restaurant in Hollywood. Agent Dean was accompanied by one Eugene McDonnell. (R.T. 31-32) While having lunch at the restaurant, Agent Dean informed

Givens that he wanted to buy three pounds of cocaine. Givens replied that he knew a guy named Jeff who had high quality cocaine for $1400 an ounce and that he would make arrangements with Jeff for Dean to buy pounds and that Jeff wanted to sell a pound to them before he did a larger transaction. (R.T. 32) A sample of cocaine was delivered to Agent Dean, who tested it and concluded that it was positive for cocaine. The agent also said that he wanted to purchase a kilogram of cocaine, which he was told would cost $40,000. (R.T. 39-41)

The next contact between Agent Dean and the defendant Givens took place on April 9, 1975, when the Agent and McDonald and defendant Givens went to Michael's Restaurant on Los Feliz in Los Angeles and met Larry Williams and one Thomas Riggio. (R.T. 65-66)

On April 22, Agent Tarillo placed a telephone call to Riggio, who told him he did not have any cocaine left but did sell Tarillo one-half kilo of heroin for $1050 an ounce. Agent Tarillo and Riggio engaged in a telephone conversation. The government offered no testimony to connect petitioner with the cocaine transaction.

On April 29, 1975 the Drug Enforcement Administration began an intensive surveillance of Riggio's activities. The previous day, April 28, 1975, a narcotic transaction was purportedly finalized between Riggio and Agent Kareem and the transaction was to purportedly take place at the Universal Sheraton Hotel. (R.T.

160) On this date three Special Agents were surveilling 15344 Weddington Street, in Van Nuys, an apartment house. (R.T. 167, 197, 205) A Special Agent named Day was instructed to conduct a surveillance on Riggio. He was not told to conduct a surveillance on or follow any other person. (R.T. 168-176) Riggio was seen by another Agent to leave the Weddington address and to go to 2611 Bellevue Avenue in the City of Los Angeles. About 20 minutes later he was seen leaving the Bellevue address carrying his coat over his right arm and hand. Another Agent stated that it was a rather warm day and he did not see Riggio hide anything under the coat or place any packages on the seat of the car. (R.T. 189)

Agent Day testified to observing and becoming aware of the existence of petitioner for the first time on April 29, 1975, when he saw petitioner driving a car behind that of Riggio (R.T. 167, 174); that petitioner was driving a white Chevrolet Monte Carlo (R.T. 174) and that he pulled in directly behind Riggio's Pontiac and thereafter stayed close to the Pontiac. Agent Day was informed that there was no second vehicle involved in the surveillance. Agent Day testified that petitioner's white Monte Carlo was observed to continue to drive behind Riggio's car and change lanes when Riggio changed lanes over a period of four or five minutes. (R.T. 172) Upon nearing the Lankershim Boulevard turnoff of the Hollywood Freeway, Agent Day testified that he observed Riggio make a motion out of the window with his hand, pointing toward the Lankershim

turnoff. (R.T. 172-173) Agent Day further testified that he observed petitioner raise up his hand from the steering wheel of the Monte Carlo and thereafter exit the freeway at Lankershim behind Riggio's car. No other activity between Riggio and petitioner was observed by Agent Day on the freeway.

Another Agent observed Riggio enter the hotel carrying the coat over his arm and that there was some kind of a bulge underneath the coat but it could have been his hand. The Agent also observed a person in a white Chevrolet Monte Carlo park near Riggio's car and remain within the parked vehicle for about 15 minutes and they were observed to drive out of the parking lot and return in about 2 minutes. None of the Agents apparently followed petitioner's car when it left the lot.

After returning, the two occupants exited the car and entered the hotel. Riggio did not have any conversation or exchange anything with the party in the white Monte Carlo. Petitioner was arrested a short time later while sitting in the hotel lobby. No narcotics were found on him or his companion. (R.T. 272-273)

The day after the April 29, 1975 arrest of petitioner, Agent Dean spoke with petitioner and was told by petitioner that he, petitioner, was at the Sheraton Hotel on the prior day to collect a debt from Riggio. Further, it was for purposes of collecting this debt that petitioner had followed Riggio to the hotel. At the time petitioner made these

statements to Agent Day, co-defendant Riggio confirmed said statement as to the purpose for petitioner's meeting Riggio at the hotel on April 29, 1975. (R.T. 110) On a later date, Agent Dean inquired of Riggio if he, Riggio, had yet paid petitioner back the loan. (R. T. 112)

The government, during the trial, introduced Riggio's home telephone number, (213) 789-2591, listed under the name of Denise Sly, at 15344 Weddington Street, Van Nuys, California (Exhibit 13). At the time of his arrest, petitioner Costey gave his address as being 2611 Bellevue Avenue, Apartment 102, Los Angeles, California. The telephone for that apartment was listed under the name of Virginia Garcia and the number was (213) 484-8537. The government introduced evidence regarding telephone calls between the two addresses. Nothing in the evidence identified who called, who the callers were or who spoke, or what they said. There was no proof that the calls related to narcotics. Without any proof, the government speculated that the conversations were between petitioner and Riggio.

Motions for judgments of acquittal were made on September 18, 1975 and denied by the Court on September 29, 1975. Petitioner was convicted on Counts One, Four and Five, and sentenced to four years in prison on each count, to run concurrent, three ~~special~~ years of special parole. Notice of appeal was duly filed and bond fixed on appeal on November 17, 1975.

At no time was petitioner Costey found in possession of any narcotic. At no time during the trial was there any evidence introduced of a conspiratorial agreement between petitioner Costey and any other person. There were no conversations between petitioner and any other defendant.

QUESTIONS PRESENTED

1. Whether the verdicts and judgments of conviction of all counts against petitioner Costey, and the sentences thereunder, without evidence in support thereof beyond a reasonable doubt, were violations of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, and plain error on the face of the entire record and a violation of the right to a fair and impartial trial. (In re Winship, 397 US 358, 25 L.ed.2d 368) The government failed to establish any knowledge or intent to be a part of a conspiracy or to support a conspiracy or to establish any conspiratorial agreement by petitioner Costey.

2. Whether in a case of conspiracy or aiding and abetting a conviction may be had on only slight evidence and whether such slight evidence measures up to the standard of proof beyond a reasonable doubt, required to convict a defendant in any criminal case, or whether a conviction based on slight evidence violates due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States. (U.S. v. Crimmins, 123 F.2d 271; Miller v. U.S., 382 F.2d

583)

3. Whether the concurrent sentence doctrine, as construed and applied in this case, deprived the petitioner of due process of law, requiring notice and an opportunity to be heard, and under the facts of this case requires a review of all of petitioner's concurrent sentences.

4. Whether the petitioner was highly prejudiced by the failure of the District Court to sever the cocaine conspiracy charges from the heroin charges in the interests of fair trial.

5. Whether the misstatement of fact in the opinion of the Court of Appeals requires reversal.

6. Whether the opinion of the Court of Appeals is contrary to this Court's holding in In re Winship, 397 US 358, 25 L.ed.2d 368.

REASONS FOR GRANTING THE WRIT

I

WHETHER THE VERDICTS AND JUDGMENTS OF CONVICTION OF ALL COUNTS AGAINST PETITIONER COSTEY, AND THE SENTENCES THEREUNDER, WITHOUT EVIDENCE IN SUPPORT THEREOF BEYOND A REASONABLE DOUBT, WERE VIOLATIONS OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND PLAIN ERROR ON THE FACE OF THE ENTIRE RECORD AND A VIOLATION

OF THE RIGHT TO A FAIR AND IMPARTIAL TRIAL. (IN RE WINSHIP, 397 US 358, 25 L.ED.2d 368)
THE GOVERNMENT FAILED TO ESTABLISH ANY KNOWLEDGE OF INTENT TO BE A PART OF A CONSPIRACY OR TO SUPPORT A CONSPIRACY OR TO ESTABLISH ANY CONSPIRATORIAL AGREEMENT BY PETITIONER COSTEY.

Failure of the government to sustain its burden of proof beyond a reasonable doubt on all of the evidence of the charged offenses resulted in a failure to establish the charges against petitioner as to the crime charged, and entitled him to judgments of acquittal. (In re Winship, 397 US 358, 25 L.ed.2d 368; Miller v. U.S., 382 F.2d 583; Falcone v. U.S., 311 U.S. 205-211, 85 L.ed. 128-132)

The conviction of a person not guilty of a crime is a substantial denial of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. (Shuttlesworth v. Birmingham, 394 US 147, 22 L.ed.2d 162; Thompson v. Louisville, 362 US 199, 4 L.ed.2d 654; Gregory v. Chicago, 394 US 111, 23 L.ed. 2d 134)

II

WHETHER IN A CASE OF CONSPIRACY OR AIDING AND ABETTING A CONVICTION MAY BE HAD ON ONLY SLIGHT EVIDENCE AND WHETHER SUCH SLIGHT EVIDENCE MEASURES UP TO THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT, REQUIRED TO CONVICT A DEFENDANT IN ANY CRIM-

INAL CASE, OR WHETHER A CONVICTION BASED ON SLIGHT EVIDENCE VIOLATES DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. (U.S. V. CRIMMINS, 123 F.2d 271; MILLER V. U.S., 382 F.2d 583)

It is important in the interests of justice and fair play to clear a defendant convicted on speculation and conjecture and who suffers the consequences thereof. This Court has never construed the slight evidence rule into conspiracy cases nor any other criminal cases, as superseding proof of guilt beyond a reasonable doubt.

Proof of conspiracy in both civil and criminal cases requires clear and convincing evidence of every element. In criminal cases, Congress has not differentiated the quantity of evidence required between principal and an aider and abettor or conspirator and has not specified that slight evidence is sufficient to connect a person with conspiracy and its dragnet consequences, and this Court should grant a hearing and so hold.

Section 2 of Title 18 puts all participants in an alleged crime on the same footing and requires the same amount of evidence as to every element of the crime charged. Petitioner Costey contends, in effect, that the evidence is insufficient to establish that he participated in a single over-all conspiracy of the crime charged.

We have found no support in this Court for the doctrine adopted by the

Court of Appeals that only slight evidence is sufficient in a criminal case to make one a defendant in a conspiracy case, and the language of Krulewitch v. U.S., 336 US 454, 458, 93 L.ed. 790, 801, says:

> "True, the modern law of conspiracy was largely evolved by the judges. But it is well and wisely settled that there can be no judge-made offenses against the United States and that every federal prosecution must be sustained by statutory authority. No statute authorizes federal judges to imply, presume or construct a conspiracy except as one may be found from evidence. To do so seems to approximate creation of a new offense and one that I would think of doubtful constitutionality even if it were created by Congress. And, at all events, it is one fundamentally and irreconcilably at war with our presumption of innocence.
>
> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evildoing without the dangers to the libery of the individual and the integrity of the judicial process that are inherent in conspiracy charges. We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation."

The government must still prove every element of the offense beyond a reasonable doubt. This includes the very important element of evidence of Costey's participation. Nothing in the rules of evidence nor the statutes says that all that is required is "slight evidence". (Leary v. U.S., 395 US 6, 23 L.ed.2d 57)

III

WHETHER THE CONCURRENT SENTENCE DOCTRINE, AS CONSTRUED AND APPLIED IN THIS CASE, DEPRIVED THE PETITIONER OF DUE PROCESS OF LAW, REQUIRING NOTICE AND AN OPPORTUNITY TO BE HEARD, AND UNDER THE FACTS OF THIS CASE REQUIRES A REVIEW OF ALL OF PETITIONER'S CONCURRENT SENTENCES.

It is necessary for this Court to grant a hearing because the Court of Appeals, having accepted the slight evidence view of Count One, has not passed on Counts Four and Five in which there is a total lack of any substantial evidence beyond a reasonable doubt (In re Winship, supra) of the petitioner's participation in a conspiracy or being connected with it.

In U.S. v. Murray, 492 F.2d 186, the Court said:

> "Under the concurrent sentence doctrine we could, in the exercise of our discretion, decline to reach this issue. See Benton v. Maryland,

395 U.S. 784, 791, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)

"However, we have elected to consider this question. San Diego County facilities were necessarily used for any telephone calls from California to Tijuana, and for sending Western Union money orders from California to Tijuana. But no direct evidence of calls made, or money orders sent, by Roberts or Walker to Tijuana was introduced."

In Benton v. Maryland, 395 US 784, 23 L.ed.2d 707, 715, the Court said:

"Because of the special circumstances in this case, we find it unnecessary to resolve this dispute. For even if the concurrent sentence doctrine susvives as a result of judicial convenience, we find good reason not to apply it here."

The basic requirements of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States are notice and an opportunity to be heard, and receive a fair trial. This encompasses a fair hearing on notice.

In a footnote in Re Gault, 387 US 1, 18 L.ed.2d 527, 549, the Court said:

"For application of the due process requirement of adequate notice in a criminal context, see, e.g., Cole v. Arkansas, 333 US 196, 92 L ed 644, 68 S Ct 514 (1948); In re Oliver, 333 US 257, 273-278,

92 L ed 682, 694-696, 68 S Ct 499 (1948). ..."

IV

WHETHER THE PETITIONER WAS HIGHLY PREJUDICED BY THE FAILURE OF THE DISTRICT COURT TO SEVER THE COCAINE CONSPIRACY CHARGES FROM THE HEROIN CHARGES IN THE INTERESTS OF FAIR TRIAL.

The Court of Appeals says:

"As to the possession counts, he makes a persuasive argument. See United States v. Gardner, 475 F.2d 1273 (9th Cir.), cert. denied, 414 U.S. 835 (1973), and United States v. Epperson, 485 F.2d 514 (9th Cir. 1973)."

In Benton v. Maryland, 395 US 784, 791, 23 L.ed.2d 714, the Court said:

"It is sufficient for present purposes to hold that there is no jurisdictional bar to consideration of challenges to multiple convictions even though concurrent sentences were imposed."

The Court in the Benton case has discussed the applicability of the concurrent sentence doctrine and said that on at least one occasion the Court had ignored the rule entirely and decided an issue that affected only one count, even though there were concurrent sentences. (Putnam v. U.S., 162 US 687,

40 L.ed. 1118; 23 L.ed.2d 1113)

It is an unfair rule to deprive a defendant-petitioner of his right to be cleared on counts in which there is a total lack of substantial evidence of his guilt or criminality.

In Sibron v. New York, 392 US 40, 20 L.ed.2d 917, the Court considered the collateral legal consequences resulting from the release of a defendant prior to argument on appeal and it determined that the case was not moot because the defendant has served his sentence and the Court held it would review the question of mootness where it goes to the very essence of the controversy for the Court to adjudicate.

A defendant in a criminal appeal has a right to have the fundamental question of his innocence and lack of any proof of his guilt to be adjudicated on appeal on all counts.

Rule 14, Federal Rules of Criminal Procedure, provides:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or an information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

In Kotteakos v. U.S., 328 US 750, 90 L.ed. 1557, 1571, the Court said:

> "The dangers of transferrance of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place."

This quotation out of the Kotteakos case, and the holding of that opinion, is applicable here. The error in joining the petitioner here on an event that allegedly occurred on April 29 was clearly the different offense than the charge in the earlier part of the indictment and permeated error which affected substantial rights of the petitioner - the right not to be tried en masse for the conglomeration of separate offenses allegedly committed by others and not this petitioner. The prejudice is apparent.

V

WHETHER THE MISSTATEMENT OF FACT IN THE OPINION OF THE COURT OF APPEALS REQUIRES REVERSAL.

The Court of Appeals in its opinion stated: "The telephone records demonstrate substantial communication between Riggio and Costey".

A communication, as referred to in this opinion, is a conversation or conversations. There is not a word in the record to support this misstatement of fact. There is no proof of any conversation between Riggio and Costey. The opinion

based upon this statement is a misstatement of the facts and the Court of Appeals fell into error by reason of the presentation to the Court of an incomplete investigation and report regarding the telephone.

Nothing was produced or shown that the petitioner at any time talked on the telephone or that he was even present on the day of the alleged conversations nor is there any evidence as to who used the telephone nor any substantial evidence as to any names on the bills and the entire subject matter of the use of the telephone was entirely speculative and conjectural and could not form the basis of any inference that petitioner had made the calls. The telephone company records and Agent Philip M. Tucker, assigned to the Drug Enforcement Administration, furnished no evidence connecting the petitioner.

Agent Tucker testified he did not recall whose name was on the bell at the addresses 2611 Bellevue Avenue, Apartment 102. (R.T. 283)

In In re Rothrock, 14 Cal.2d 34, 40, the Court held that where it fell into error by reason of a fact that counsel failed to properly brief and present the question under consideration, that the Court would remand the case to trial for a new trial.

VI

WHETHER THE OPINION OF THE COURT OF APPEALS IS CONTRARY

TO THIS COURT'S HOLDING IN IN RE WINSHIP, 397 US 358, 25 L.ED. 2d 368.

The Court of Appeals erroneously held that only slight evidence is necessary to convict a defendant of being guilty of a conspiracy and it sustained the convictions in ignorance of the requirement that in criminal cases due process in the courts of the United States demands that proof of a criminal charge be established beyond a reasonable doubt. (In re Winship, 397 US 358, 25 L.ed.2d 368)

The Winship case holds that proof of a criminal charge, beyond a reasonable doubt, is constitutionally required. (397 US 362)

In the Winship case the Court said, quoting from Brinegar v. U.S., 338 US 160, 174, 93 L.ed. 1879, 1889:

> "In a similar vein, the Court said in Brinegar v United States, supra, at 174, 93 L Ed at 1889, that '(g)uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.' Davis v. United States,

supra, at 488, 40 L Ed at 506, stated that the requirement is implicit in 'constitutions ... (which) recognize the fundamental principles that are deemed essential for the protection of life and liberty.' ..."

The Court of Appeals has taken trifles light as air and given them the weight of Holy Writ. None of the items discussed in their opinion prove facts which, if believed, would show guilt on the part of Costey beyond a reasonable doubt, nor has the Court certified that the evidence showed guilt beyond a reasonable doubt, as required by Chapman v. California, 386 US 18, 17 L.ed.2d 705.

The motions for judgments of acquittal as to Costey should have been granted and should be ordered by this Honorable Court.

In a conspiracy and in the crimes charged, in order to establish a person as a participant in a conspiracy, the evidence must show that the accused intended to join and cooperate in the illegal venture. Knowledge that a conspiracy exists is a minimum requirement for establishing the requisite intent. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. (Direct Sales Co. v. U.S., 319 US 703, 711, 87 L.ed. 1674. See: Daily v. U.S., 282 F.2d 818, 821-822.)

Association with an alleged co-conspirator may raise a strong suspicion of

knowledge and intent, but this is not the only reasonable inference which may be drawn from such conduct. (Evans v. U.S., 257 F.2d 121, 126; Ong Way Jong v. U.S., 245 F.2d 392, 394)

WHEREFORE, petitioner prays that this Honorable Court grant certiorari and reverse the judgments on all counts and order judgments of acquittal.

Dated: May 18, 1977

Respectfully submitted,

MORRIS LAVINE

Attorney for Petitioner

APPENDIX "A"

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
(
Plaintiff-Appellee,)
(
vs.)
(
WILLIAM ESCARSEGA COSTEY,)
(
Defendant-Appellant.)

No. 75-3566

MEMORANDUM

(January 31, 1977)

Appeal from the United States District Court for the Central District of California

---

Before: CHAMBERS and WALLACE, Circuit Judges, and JAMESON,* District Judge

Costey was indicted, along with several others, for conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. Sec. 846, for possession, together with Riggio, of heroin with intent to distribute in violation of 21 U.S.C. Sec. 841(a)(1), and

---

*Honorable William J. Jameson, United States District Judge, District of Montana, sitting by designation.

for aiding and abetting Riggio in the distribution of heroin in violation of 21 U.S.C. Sec. 841(a)(1) and 18 U.S.C. Sec. 2. Costey appeals from a conviction following a non-jury trial. We affirm.

Costey's primary contention on appeal is that the evidence was insufficient to sustain the judgment of conviction. As to the possession counts, he makes a persuasive argument. See United States v. Gardner, 475 F.2d 1273 (9th Cir.), cert.denied, 414 U.S. 835 (1973), and United States v. Epperson, 485 F.2d 514 (9th Cir. 1973). However, Costey received a concurrent sentence on all three counts. Therefore, if we affirm the conspiracy count, we need not consider the issues raised as to the possession counts. United States v. Rodriguez, __F.2d__, ___ (9th Cir. Nov. 18, 1976); United States v. Murray, 492 F.2d 178, 186 (9th Cir. 1973), cert. denied, 419 U.S. 854 (1974); see Benton v. Maryland, 395 U.S. 784 (1969)

The conspiracy was clearly established and Riggio was obviously a member of it. Where a conspiracy is clearly proven, only slight evidence is needed for a jury to find participation in the conspiracy. United States v. Turner, 528 F.2d 143, 162 (9th Cir. 1975); United States v. Westover, 511 F.2d 1154, 1157 (9th Cir.), cert. denied, 422 U.S. 1009 (1975); United States v. See, 505 F.2d 845, 856 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975). In this case, the trial was held before a judge sitting without a jury. According to our research, the slight evidence rule has never been applied in this context. However, the burden of proof for a finding of guilt is the same whether trial is held before a judge or before a jury. Guilt must be proven

beyond a reasonable doubt. Holland v. United States, 348 U.S. 121, 138 (1954); United States v. Lake, 482 F.2d 146, 149 (9th Cir. 1973). Because slight evidence of participation is sufficient for a jury to determine beyond a reasonable doubt that a defendant was guilty of participating in a proven conspiracy, the same quantum of evidence is sufficient to find guilt where trial is held before a judge.

Thus the question on review in this case is whether the record shows the necessary slight evidence of Costey's participation. In making this determination, we must view the evidence and all reasonable inferences arising therefrom in a light most favorable to the government as the prevailing party. United States v. Hood, 493 F.2d 677, 680 (9th Cir.), cert.denied, 419 U.S. 852 (1974).

There are several items of relevant evidence. Riggio indicated that he was not the top man. The telephone records demonstrate substantial communication between Riggio and Costey. There were a total of 77 telephone calls between the residences of the two men during the month of April 1975, including 11 calls on April 28 and 29, the day before and the day of the attempted sale of one pound of heroin.

On his way to the hotel where the sale was to occur, Riggio stopped at Costey's apartment building for 20 minutes and left with a coat over his hand and arm.

On the freeway leading to the hotel, Costey was seen to pull in directly behind Riggio's car and stay unusually close. While still on the freeway, Riggio signalled to Costey to indicate the proper turnoff;

Costey signalled back, indicating receipt of the message.

When the two cars arrived at the hotel, Riggio parked in the hotel parking lot. Costey parked nearby but there was no conversation between the two men. Riggio entered the hotel with a coat over his hand and arm. During the time period while Riggio was in the hotel, Costey waited in his car for 15 minutes, drove off for a period of two minutes, returned to the same parking space and then left his car and entered the hotel lobby.

We find that this constitutes the necessary slight evidence of participation. The evidence in the aggregate indicates that Costey intended to join and cooperate in the illegal venture. Miller v. United States, 382 F.2d 583, 587 (9th Cir. 1967).

AFFIRMED.